2-16-2010

State v. Green Appellant's Reply Brief Dckt. 36723

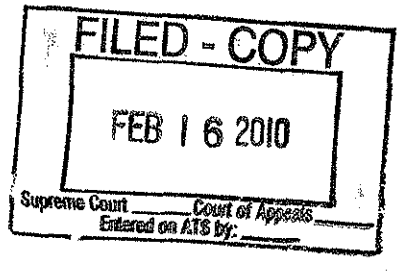
IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. BRADLEY D. GREEN, Defendant/Appellant.	)	Supreme Court No. 36723

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the
Fifth Judicial District of the State of Idaho,
in and for the County of Blaine

HONORABLE ROBERT J. ELGEE
District Judge



Brian E. Elkins, P.C.
Attorney at Law
P. O. Box 766
Ketchum, ID 83340

(208) 726-4338

Attorney for Defendant/Appellant

State Attorney General
Criminal Appeals
P. O. Box 83720
Boise, ID 83720-0010

(208) 334-2400

Attorney for Plaintiff/Respondent

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APPELLANT'S REPLY

Pursuant to I.A.R. 35(c), Green files his Reply Brief limited to additional argument and rebuttal to the contentions of the State made in its Respondent's Brief.

RESPONSE TO STATE'S STATEMENT OF FACTS

The State argues that Green "refused to perform the tests and demanded that his attorney be present." (Respondent's Brief, p. 1; citing Tr., p. 17, L. 25 - p. 20, L. 14.)

Officer Davis testified at the evidentiary hearing that:

> At that point there he wondered why he had to do it, I know that much, and then – would it be okay if I looked at my report? I can't quite recall.
> ***
> Mr. Green had stated he was not interested in doing field sobriety tests and wanted counsel present.

(Tr., p. 18, Ls. 1-8.) However, the actual audio recording of the incident, Defendant's Exhibit A, is a little different in that Green told Officer Davis that he would be happy to perform the tests once he was able to communicate with counsel (*See,* Defendant's Exhibit A, 2:40).

The State also argues that the booking process "was delayed by Green's lack of cooperation" (Respondent's Brief, p. 2; citing Tr., p. 29, L.19 - p.30, L. 6) but there is nothing in the record to show the length of the delay and, if anything, it was insignificant as once Green was threatened with being thrown in the "drunk tank" he quickly remembered his address and Social Security Number. (Tr., p. 30, Ls. 1-6.)

The State mentions there is no record of Green's blood alcohol content: it was in excess of the legal limit since he agreed to conditionally plead to DUI. Green's BAC was .14.

RESPONSE TO THE STATE'S "ARGUMENT"

The State suggests that Green is arguing that his rights were violated during the field tests when he was denied the opportunity to consult with counsel "to arrange alternative testing during the officer's attempted administration of the field sobriety tests . . . ." *See,* Respondent's Brief, p.

4. Green is not suggesting that he was entitled to make arrangements for a blood test during the field sobriety tests nor is Green asking this Court to decide whether he was entitled to speak to a lawyer during the field sobriety tests. Green's position is that he should have been allowed to make a phone call, at a minimum, when his blood was drawn, not an hour and 10 minutes later when he was released on bail; and more importantly it is Green's position that he should have been allowed to make a phone call after he "refused" to submit to a breath test at 2:03 a.m. at the Blaine County Sheriff's Department.

Under the totality of the circumstances when examining whether Green's due process rights were compromised, Green believes it is important to point out the incorrect statements that were made by Officer Davis during the field tests and ultimately what he was placed under arrest for. As pointed out earlier, Green was placed under arrest, as described by the magistrate, for "refusing to submit to evidentiary tests." (R., p. 43.) Officer Davis also told Green that he was required to perform field sobriety tests under Idaho's implied consent law and that Green agreed to do that when he signed up for his Washington's driver's license. Officer Davis testified that he was choosing to use field sobriety tests as the evidentiary tests under Idaho's implied consent law.

Both the magistrate and the district court at least acknowledged that this issue presented a "close call" but seemed to err on the side of caution by not thinking that concepts of fundamental fairness and due process should allow Green to make a call to his lawyer while Officer Davis secured a blood warrant. For example, the magistrate said: "This is a close call because the case law makes clear that priority should always be given to a person attempting to preserve or obtain exculpatory evidence." (R., p. 47.) The district court said:

> The right to a phone call so that you can gather evidence. That's what *Madden* and *Carr* seem to talk about.
>
> But I think your point is that right accrues equally to the defendant and the State as soon as the officer says, okay, that's a refusal, you're getting the penalties for refusal. And I think your point is, okay, now I get my phone call, now I can gather evidence, exculpatory evidence, just like the State can gather their evidence for a prosecution. The State may be able to hold them in custody. The defendant isn't able to bond out but ought to be able to make his phone call.

> And in looking at that side, I can see the defendant's point. The defendant could perhaps be able to call a bail bondsman, and attorney, anyone else and say, look, they're going to get a warrant, I'm apparently going to the hospital, I want my own test, I want – they're going to take me down and draw blood. I want to arrange for my own blood test while I'm down there or whatever. Really, what we're talking about here is the right to gather evidence and when you get it, when it accrues.

(Tr., p. 47, Ls. 8-25; p. 48, Ls. 1-3.)

This idea was first recognized by the Idaho Supreme Court in *State v. Woolery,* 116 Idaho 368, 775 P.2d 1210 (1989) where there exists an "inherent exigency" with the destruction of evidence by metabolism of alcohol in the blood system which provided a basis for the court's decision in *State v. Carr,* 128 Idaho 181, 184, 911 P.2d 774 (Ct. App. 1996). In *Carr,* the court said: "Therefore, the only opportunity for a defendant in a DUI case to gather exculpatory evidence is within a reasonable time following his arrest and administration of the State's BAC test." The *Carr* case thereafter, cited with approval, *Tacoma v. Heater,* 67 Wash.2d 733, 409 P.2d 867, 871 (1966) noting that a defendant's rights were violated when he was denied an opportunity to contact an attorney following the issuance of a citation for DUI which prevented the defendant's effective preparation of a defense. *See, also, State v. Cantrell,* 139 Idaho 409, 80 P.3d 345 (Ct. App. 2003) (detainee's opportunity to gather exculpatory evidence lasts only a short time following arrest). ("In *Carr*, we held that a several-hour delay in granting a defendant's request to speak to her attorney was a deprivation of due process because it prevented her from preserving evidence concerning her level of sobriety.")

However, the magistrate and district court, and now the State, attempt to distinguish *Green* from *Madden* and *Carr* by arguing that Green was not entitled to call his lawyer because he "refused" to submit to the breath test. On Defendant's Exhibit A Green did not affirmatively say that he was refusing to submit to the test and, following his earlier offers of conditional compliance with FSTs, Green told Officer Davis that he would be happy to submit to the breath test once he was able to talk to a lawyer (Defendant's Exhibit A, 13:09). As pointed out in Green's Appellant's Brief, the Intoxilyzer 5000 Breath Testing Machine "timed out" at 2:03 and

printed a card noting "subject refused to continue" (R., p. 5).[1]

But the effort to distinguish *Green* is of no consequence especially when one considers the "inherent exigency" that is occurring as evidence is destroyed or altered. This is where the Montana Supreme Court came down when it decided *State v. Swanson,* 222 Mont. 357, 722 P.2d 1155 (1986) (one accused of DUI has right to obtain independent blood test to establish his sobriety, regardless of whether he submits to a test chosen by the police). *See, also, Smith v. Cada,* 562 P.2d 390 (Ariz. App. 1977).

This is heightened by the present situation where Green was being held in the conference room at the Blaine County Sheriff's Department for approximately 52 minutes while the blood warrant was obtained that was not even necessary under *Woolery*. Green literally sat there during that time while his BAC was altered and/or destroyed and no delay or disruption could have occurred during that time period if Green had been allowed to call a lawyer.

Another point that seems to be lost by the lower courts, and now the State, is that Green was still not allowed to call a lawyer after he submitted to a blood draw at 3:30 a.m. and was not released from jail until 4:40 a.m. which would have been the earliest that he could have called a lawyer. Another hour and ten minutes went by while Green was prevented from making a call to a lawyer. That fact, in and of itself, would seem under *Carr* to justify suppressing Green's blood test results.

The State, time and again, takes selective portions out of I. C. § 18-8002(4)(e) by only quoting the first sentence out of that subsection, the balance of which reads:

> The failure or inability to obtain an additional test or tests by a person shall not preclude the admission of results of evidentiary testing for alcohol concentration or for the presence of drugs or other intoxicating substances taken at the direction of the peace officer unless the additional test was denied by the peace officer.

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[1]*See, also,* Intoxilyzer 5000 - Operator's Training Manual (March 2007) issued by the Idaho State Police Forensic Services, p. 8, where it reads, in part: "After the message "PLEASE BLOW/R" is displayed, the instrument will automatically printout a refusal if a sample is not obtained within (3) three minutes."

Later in its brief, Respondent's Brief, p. 11, the State cites I. C. § 18-8002A(2)(f) which is misplaced as that statute deals with administrative proceedings and is an incorrect recitation of Idaho's implied consent law set forth in I. C. § 18-8002.[2] For these reasons, Green does agree with the State that I. C. § 18-8002A(2) is "constitutionally misleading" but that administrative statute is not really applicable to Green's situation.

As in *Carr,* Green's primary complaint does not pass or fail based upon a strict reading of I. C. § 18-8002(4)(e), as suggested by the State, but rather it is hinged upon an analysis of due process. It is interesting to note, however, that the State did not contest Green's argument that the application of Idaho's implied consent law technically concluded when Green was construed as having "refused" the breath test. At that point, Officer Davis went about an unnecessary delay of seeking a blood warrant which, by the way, Green submitted to. That fine distinction is important in analyzing the grand scheme of things presented by Green. It is Green's view that the application of Idaho's implied consent law ended when it was construed, or determined, that Green had refused to submit to a breath test.

But, certainly, it can be seen that *Carr* did not involve the strict application of Idaho's implied consent law under I. C. § 18-8002(4)(e). She did not request to have "additional tests made by a person of [her] own choosing" but rather she was simply asking to be able to call her lawyer. If we apply the State's argument in Green's case to the *Carr* holding, then the *Carr* decision would not have come out as it did. Relying on language from cases decided by the United States Supreme Court, the *Carr* court realized,

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. (Citation omitted.) Due process, unlike some legal rules, "is not a technical conception with a fixed content unrelated to time, place and circumstances." (Citation omitted.) Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." (Citation omitted.)
> * * *
> The private interest affected in this case is Carr's interest in procuring evidence which would challenge the results of the State's BAC test. By

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[2]For example, other mistakes in the administrative proceeding set forth in I. C. § 18-8002A fails to advise the driver that if he refuses to submit to a BAC test, he will subject himself to a civil penalty of $250. *See, Id.* at (2)(c). Compare with I. C. § 18-8002(3)(a).

> denying Carr access to a telephone for approximately five hours after her arrest for DUI, the State denied her the means by which she could establish her defense. As recognized by the Idaho Supreme Court an "inherent exigency" exists in a DUI setting, due to the destruction of evidence by metabolism of alcohol in the blood.

128 Idaho at 184.

We submit the "procedural protections" in Green's "particular situation" demands that he be permitted to make a telephone call while evidence was wasting away.

Green concedes that there is language in *Carr* that says ". . . When a person is arrested for DUI and given an evidentiary BAC test, that person must be allowed, at a minimum, to make a phone call upon request to do so." *Id.* However, Green, unlike the State, does not read that language to boldly stand for the proposition that a phone call can *only* be made once the accused submits to the State's BAC test. When one compares that language with the broader notions of due process cited above, it seems to be insignificant. Indeed, as can be seen from Green's situation, such a condition offends notions of fundamental fairness as Green sat in a conference room at the Blaine County Sheriff's Department for 50 minutes while waiting for an unnecessary blood warrant when there would have been no harm in allowing him to make a phone call.

If this Court is faced with choosing between the rationale of the case relied upon by the State, *State v. Larivee,* 656 NW.2d 226 (Minn. 2003) or those cases decided similar to *State v. Swanson,* 722 P.2d 1155, then the better reason rule, Green submits, is premised upon the holding in *State v. Swanson.*

If one recognizes the fundamental theme from *Woolery,* an "inherent exigency" and the due process right to obtain exculpatory evidence from *Carr,* then it seems that the natural flow of these opinions would point to the *State v. Swanson* rationale instead of a strict requirement, based upon a provision of the implied consent law that the subject first be required to submit to the State's test before being allowed to make a phone call. In *Swanson,* the Montana Supreme Court rejected a similar argument that was made by the State in that case relying on Montana's implied consent statute.

> A criminal accused has a constitutional right to attempt to obtain exculpatory evidence. When the crime involves intoxication, the accused has a right to obtain a sobriety test independent of that offered by the arresting officer. The

> language of § 61-8-405(2), MCA, does not support the State's interpretation that the right to an independent test arises only after the accused takes a test designated by the arresting officer. The Arizona Appellate Court interpreted a statute identical to § 61-8-405(2), MCA, and held that the State's interpretation "would result in an unconstitutional restraint on the right of a criminal accused to attempt to obtain independent evidence of his innocense and operate to deprive the accused of due process of law. *Smith v. Cada,* (1977) 114 Ariz. 510, 562 P.2d 390, 393. Other cases also hold that denying one charged with an offense involving intoxication the right to attempt to obtain at his own expense a blood or other tests to establish sobriety amounts to a denial of due process. *State v. Choate* (Tenn. 1983), 667 S.W.2d 111; *McNutt v. Arizona* (1982), 133 Ariz. 7, 648 P.2d 122; *State v. Snipes* (Mo. 1972), 478 S.W.2d 299; *Kesler v. Department of Motor Vehicles,* 459 P.2d 900 (parallel cite omitted) (1969); *In Re Martin* (1962), 374 P.2d 801 (parallel cite omitted).

State v. Swanson, 722 P.2d 1155, 1157.

The symmetry of *Swanson's* reliance of *McNutt v. Superior Court of State of Arizona* should not be missed as the *Carr* court also relied on *McNutt.*

Lastly, on page 13 of the Respondent's Brief, the State argues that I. C. § 18-8002(2) does not provide "an affirmative statutory right to consult with counsel . . . after refusing to submit to the State's evidentiary testing." (Respondent's Brief, p. 13.) Again, it appears that Green needs to reiterate this point. He did not "refuse" to submit to the test in practical terms by saying "I refuse to submit to your test." Green kept saying that he would be happy to take the test after he spoke to his lawyer. But the right of an accused to speak to a lawyer is not conditioned upon submitting to the test as we can see from *Madden* and *Carr* and *Carr's* reliance on *Tacoma v. Heater, supra* (which held denial of right to contact a lawyer following issuance of citation for DUI prevented defendant's effective preparation of defense because of the destruction of evidence through the metabolism of alcohol).

Under paragraph D of the Respondent's Brief, pp. 13-14, the State argues that "The record is devoid of evidence that the State denied or materially interfered with Green's opportunity to contact counsel or make arrangements for additional testing once Green actually submitted to the blood draw." As was the testimony in *Madden,* it remains unchanged through the testimony of Officer Davis where the officer testified that it was his understanding that Green was not entitled to call a lawyer until he posted bail and was released from jail (Tr., p. 30, Ls. 19-

25; p. 31, Ls. 1-3.). In *Madden,* the opinion refers to the policy of the Blaine County Jail that DUI arrestees could not call their lawyer until booking procedures were completed. Finally, the State argues on page 14 of its brief that Green has failed to show that any right to arrange alternative testing was violated after the blood draw but that argument was already rejected in *Carr.*

CONCLUSION

Green respectfully requests that the Court reverse the magistrate's denial of Green's Motion to Suppress. Green was arrested at 1:28 a.m. and was released from custody at 4:40 a.m. During that entire time, Green was not permitted access to a telephone to call his lawyer. During that entire time, his right to due process slipped away with each tick of the clock.

RESPECTFULLY SUBMITTED this 11 day of February, 2010.

BRIAN E. ELKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of February, 2010, I caused a true and correct copy of the foregoing document to be delivered to the following in the method marked herein:

✓ Mailed
_____ Hand-Delivered
_____ Faxed to _____
_____ Faxed to _____
and mailed

Mark W. Olsen, Deputy State Attorney General
Criminal Appeals
P. O. Box 83720
Boise, ID 83720-0010

BRIAN E. ELKINS

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